84-1716

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ALEXANDER L. STEVAS
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

No. _____

OCTOBER TERM, 19 __

OWEN WILSON, et al, on behalf of themselves and all others similarly situated, Petitioners

v.

NORTH CAROLINA MUTUAL LIFE INSURANCE COMPANY OF DURHAM, et al

Respondents

PETITION FOR A WRIT OF CERTIORARI IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

OWEN M. WILSON, Attorney - Pro se
Counsel for other petitioners similarly situated
2412 Laurel Bush Road
Abingdon, Maryland 21009
(301) 879-1805-(301) 836-8676

39 pp

## QUESTIONS PRESENTED

1. In view of this Courts' recent cases on the subject does the exemption from the Sherman Antitrust Act, as amended, by the McCarran-Ferguson Act relating to insurance companies still apply only to the "business of insurance", except when there is no lawful state regulation, and not to the "business of insurance companies", inter company action, such as mergers?

2. Where there is a state law that appears to include interstate regulation of insurance companies but cannot owing to jurisdictional disability, does this fall short of McCarran-Ferguson Act amendment to the Sherman Antitrust Act, as amended, requiring valid state regulation, thus eliminating the insurance company exemption as to "business of insurance"?

3. When there are clear accomplished violations of the Sherman Act as amended, involving, A. Interlocking directors and officers in acquired competing companies. B. Horizontal restraint through complete elimination of three directly competing companies through acquisition of 100% of all assets of one full line life, health and hospitalization insurance company and stock control of of two other similar companies, along with, C. 100% stock control of a life and health insurance company holding corporation, does the McCarran exemption provide complete emmunity where all the action taken was intercompany?

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PARTIES TO THE PROCEEDING IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Plaintiffs: Owen Wilson Mary Dorsey, Novella Jones, Judith Thomas, Rodell Baker, Maxine Rawlings, Daisey Richardson, Louise Cunningham, Winston Realty Corporation, The class policyholders of Mutual Benefit Society of Baltimore City and minority stockholders of American Citizens Life Insurance Corporation of Washington, D. C.

Defendants: North Carolina Mutual Life Insurance Company of Durham, N. C., Southern Life Insurance Comany of Baltimore City, Midwest Underwriters, Inc., W. J. Kennedy, III, Milton Branch, Maceo A. Sloan, Harold Davis, Wayne W. Perry, Cicero M. Green, Jr., Harry O. Wilson, Jr. (now deceased), Dennis Stackhouse, H. L. Wilson, Helen Wilson and David Wilson.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 19 ___

No. _____

---

OWEN WILSON, ET AL, on behalf of themselves and all others similarly situated, Petitioners

v.

NORTH CAROLINA MUTUAL LIFE INSURANCE COMPANY OF DURHAM, ET AL Respondents

---

To the Honorable: The Chief Justice and Associate Justices of the Supreme Court of the United States:

Owen Wilson, et al, on behalf of themselves and all others similarly situated, petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

## OPINIONS BELOW

There were no opinions rendered in

either of the courts below. Judgments as issued are contained in Appendixes A & B.

## JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on October 29, 1984. A timely filed petition for rehearing en banc was denied on December 17, 1984. The Honorable Chief Justice extended the time in which to petition for a writ of certiorari to and including April 16, 1985, by Order dated March 11, 1985. Jurisdiction of this Court would be invoked under 28 U.S.C. 1254(1).

## STATEMENT OF THE CASE

On January 1, 1979, a contract merging all assets of every kind was signed by one official of a 75 year old full line life, health and hospitalization Maryland insurance company. The acquiring company was an established similar company domiciled in

BEST AVAILABLE COPY

North Carolina. Included in the agreement were subsidiaries of the Maryland company, a wholely owned insurance company holding corporation and a more than 90% controled full line health, life and hospitalization insurance domiciled in Washington, D.C. In addition, a third full line line insurance company of the exact same type, also domiciled in Maryland, was included in the transaction but not as a direct integral part of the January contract.

All insurance companies acquired were direct horizontal competitors to the acquiring company on an interstate basis. A kind of very low cost health, hospitalization and life insurance not readily available anywhere was offered by acquired companies. This source was eliminated on merger. The acquired parent company ceased to exist as an insurance company after merger. Included in the contract of merger was the word "reinsurance",

which was a misnomer. This was in no way reinsurance as defined in the industry.

The Maryland Insurance Commissioner approved the acquisition even though the Maryland regulation cited by him did not provide for interstate transactions of this kind. On appeal the Commissioners' approval was not reviewed by the courts owing to a simple procedual matter involving filing a petition of appeal out of time.

Suit was filed in the United States District Court of Washington, D. C., November 12, 1980. The complaint included additional points but the most significant one concerned the interpretation of the interstate antitrust aspects, viz: the McCarran-Ferguson Act amendment to the Sherman Act. The District Court ruled on the case by order dated June 30, 1983, granting defendant's motion to dismiss with no hearing of any kind. A foot note

to the order denied every aspect of plaintiffs claim. Plaintiffs filed an appeal to the United States Court of Appeals for the District of Columbia on the 20th of July, 1983. Briefs were filed and the case was argued October 24, 1984, on 15 minute intervals by opposing attorneys. After affirming the lower courts order petitioners sort a rehearing en banc, which was denied by the Court of Appeals by order of December 17, 1984.

REASONS FOR GRANTING PETITION

Clarification of the current effect of the McCarran-Ferguson Act amendment to the Sherman Act, as amended, is of prime importance to the nation as well as to petitioners case. Petitioners contend that the intercompany contract of 100% merger, triggering their legal action, that included the word "reinsurance", apparently the basis for the District Courts ruling owing to the McCarran-Ferguson exemption that applies to some types of "business of

insurance", is clearly "business of insurance companies", not now considered exempt from federal antitrust action. Further, that the same interpretation can be applied to the giants of the health care industry, viz: Blue Cross and Blue Shield, where the lives of millions of citizens and billions of dollars are involved. Granting certiorari in this case could be of great importance to this nation as a whole.

The distinction between "business of insurance" and "business of insurance companies" was first recognized and defined by this Court in S.E.C. v. Variable Annuity insurance Co. 359 U.S. 65, and further narrowed in S.E.C. v. National Securities Inc., et al, 393 U.S. 453. "Business of insurance companies" was separated from the McCarran exemption in Group Life & Health Insurance Co. v. Royal Drug Co. 99 S. Ct. 1067 and followed in U.S. v. Title Ins. Rating Bureau of Arizona, Inc. 700 F2, 1247.

Since the enactment of the McCarran-Ferguson Act, March 9, 1945, Pub. L. No. 79-115, 59 Stat 33, and the broad Federal Health Insurance program in 1965, the health care industry has expanded tremendously under the umbrella of the McCarran exemption, growing into the largest monopoly of its kind known in this country. Health care costs have exploded within the past two decades far beyond anyones belief. Premium income received by the Blue Cross and Blue Shield now exceeds all health insurance premiums collected by over 1,000 private companies. This does not include "pass through" funds in billions of dollars supplied by the United States Government to the "Blues" as fiscal intermediaries state wide and the District of Columbia to help administer payments to providers, all supplying tremendous market power and control.

There have been many suits by private insurance companies and others claiming

antitrust violations against the "Blues" but, though this particular situation was not contemplated by the framers of the McCarran Act in 1945, the courts held in the early days that the Act gave blanket protection as long as remotely collateral action was not involved. The "Blues" have had these advantages with which to expand but now it appears that their protection under the McCarran no longer exists, a factor in need of final resolution most sorely. Over the years the monopolistic control was significant.

Reimbursement for medical expenses under federal laws, Medicaid and Medicare, at the beginning, 1966, was guaranteed at any price. Beneficiaries under the federal programs were free to obtain medical service anywhere and payment was certain. As need for some control over costs became very obvious Congress imposed many restrictive laws, in addition state legislatures tried to assist but all to little or

no avail. As some costs were reduced or controled to some degree, peer groups, who operated the "Blues" worked out ways to keep costs rising.

The review system of medical service existing throughout the nation was and is composed of members of the health care entities, Ratino v. Medical Servic of D.C. 718 F2, 1260.(1983) State of Arizona v. Maricopa City 102 S. Ct. 2466(1982) The idea was to depend on this peer group to control costs and provide better medical service, but it had the exact opposite effect.

The most effective solution for members of the professional health care group to maintain and enhance their income in reaction to the costs cutting efforts of governmental bodies was to resort to the most costly method to solve a given diagnosed assumed medical problem, even when there was a clear uncertainty as to a real

need or where more simplistic methods could prove just as effective, and in most cases, much less risk to life and limb. It was, and is now to a great degree, a simple matter on peer recommendation to obtain ready increases in premium rates, and with proper certification, payment from the Federal Government, with no challenge from anyone. Costs continued to esculate under this plan, but unfortunately so did death, permanent patient impairment, needless pain, suffering and mental anguish, along with added economic hardship as beneficiaries had to assume added costs under new government cost containment programs.

One recent example of a single surgical operation that received some notoriety. Annual number of operations performed just after federal entitlement programs: None. Total completed for year 1983; 191,000, with average cost of over $25,000. each, increasing to as high as over $100,000. each in some cases. Annual total of over

$5 billion, increasing yearly with a high death rate and a very poor record of effective succes. "Coronary Bypass Surgery: Remedy or Racket?", Thomas A. Preston, M.D. Chief cardiologist at Pacific Medical Center.

Virtually every cost esculatable has met this same fate including high cost equipment, earnings of some assistants over $500,000. annually, unnecessary costly added tests etc. Health care industry is now the second largest in the nation and the fastest growing component of federal spending, it now consumes about 11% of the total Federal Budget. Health Insurance Assocation of America, Washington, D. C.

In view of the profound effect it has on the financial stability and future of the National Debt, a clear resolution of the interpretation of the monopoly causing McCarran Act, as it applies to the health care industry and to the analogous position of petitioners' case, takes a significant

position of importance.

Congress has recently made strengthening of competition in the health service industry a matter of national priority and had directed that special consideration be given throughout the planning process to the importance of maintaining and improving competition in the health industry.
Kartel v. Blue Shield of Mass. 592 F2, 1191.
The United States Government now provides health insurance for over 47,000,000 people, over 20% of the total population and growing.
W. C. Grace Report to Congress.

Legislation, though extensive, has not been very effective. Independent health, hospitalization and life insurance companies are fully equipped to cope with cost esculation control. Peer groups in control of the "Blues" would be facing medical staffs with proven cost containment methods coupled with stored logic in massive computer banks monitoring all claims in depth with effective statistical support for all action taken.

any needless or groundless esculation in costs, such as unnecessary,dangerous high cost operations or other services, would be quickly refuted unless meaningful proof was developed as proper diagnosis, etc. Technology Today & Tomorrow; Taking Control of Health Care Costs". Richard J. Sampson.

Owing to application of closer guide lines established by this Court in Union Labor Life Ins. Co. v. Perino 102 S. Ct.3002, subsequent to Group Life & Health Ins. Co. v. Royal Drug Co. supra, which narrowed further the McCarran exemption, there may have been some indication of some competitive forces working in the past year, in that the percentage of annual increase in health care costs to the Federal Government has shown a small decrease. Natl. Law Journal, 2/18/85 The legislated prospective payment plan also seems to have had some slight effect, however, the contribution by recipients has also increased. Congress soon found that the health care industry did not respond

to classic market place forces. National Gerimedical Hosp. & Geron. Ctr. v. Blue Cross of Kansas City 101 S. Ct. 2415. In this case antitrust immunity was held not justified by the facts, even where an industry is regulated substantially this did not necessarily evidence an intent to repeal antitrust laws.

As recognized in American Journal of Law & Medicine, Vol. 7, No. 4, Winter, 1982, after a general review of the health care problem it concluded, "preliminary indications from federal courts are that the real revolution, or at least the first revolution, in the health care service may come not from a national health plan but from forceful application of antitrust laws."

Indications are that opening the health care field to effective competition is all that is needed to control costs and provide better and safer service for citizens. Massive legislation has not done the job.

## CONCLUSION

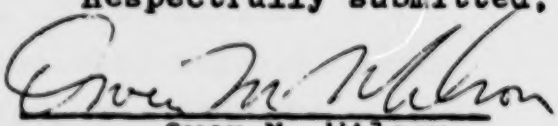
In compliance with the Courts' rule for brevity consideration of much of the added material applicable to the question presented has been very limited. There are facts and statistics to verify and confirm points covered in depth. Granting of certiorari to petitioners, who believe their case to be an example of the importance of the McCarran exemption permiting monopolistic control of the health insurance and care industry as it affects them as well as the nation, could permit a review and resolution of this question.

The McCarran Act was enacted nearly 40 years ago simply to clarify state regulation and taxation of insurance companies, providing some limited exemption from the Sherman Act. Many changes have taken place. There was no comparable condition then as now, in so far as the health care industry is concerned. While it is true that some

restraint has been imposed on the scope of its exemption, until a clear definition as applied to present day conditions is established, permiting free compitition the nation will continue to be hurt economically and its citizens will suffer greater physical, mental and financial problems.

Petitioners contend that the more than six violations of the Sherman Act in their case are not within the McCarran exemption as interpreted in recent decisions of this Honorable Court.

Respectfully submitted,



Owen M. Wilson

Attorney - Pro se, Counsel for other Petitioners

2412 Laurel Bush Road

Abingdon, Maryland 21009

(301) 879-1805

## CERTIFICATE OF SERVICE

This is to certify that a copy of the aforegoing Petition for a Writ of Certiorari has been mailed, postpaid, this _____ day of _____, 1985, to the following attorneys of record:

Eugene D. Gulland, Esq.
1201 Pennsylvania Avenue, N.W.
Washington, D. C. 20044

Charles J. Josey, Esq.
Houston Marshall Law Center Bldg.
12 E. Pleasant St.
Baltimore, MD 21202

Harrison M. Robertson, Esq
Michael E. Yaggey, Esq.
929 N. Howard St.
Baltimore, MD 21201

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

OWEN WILSON, et al,
Plaintiffs
v. . No. 80-2890

NORTH CAROLINA MUTUAL LIFE INSURANCE COMPANY, et al
Defendants
Civil Action

---

O R D E R

This matter is presently before the Court on defendants' motions to dismiss plaintiffs' complaint pursuant to Rule 12 (b)(6) of the Federal Rules of Civil Procedure. Plaintiff has opposed these motions.

After careful consideration of the motions, oppositions thereto, replies, memoranda of points and authorities, administrative record, detailed findings and orders issued by the Maryland Insurance Commissioner, the Court concludes that plaintiff's action lacks merit, and therefore must be dismissed.*

In view of the above, it is this 30th day of June, 1983, hereby

ORDERED that defendants' respective

motions to dismiss are GRANTED, and it is further

ORDERED that plaintiff's complaint is dismissed with prejudice.

(s)

John Garrett Penn
United States District Judge

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* The Court concludes that: (1) plaintiffs' complaint represents a meritless collateral attack upon the findings and conclusions issued by the Maryland Insurance Commission; (2) the McCarran-Ferguson Act, 15 U.S.C. Sec 1011, et seq., exempts the reinsurance transaction of which plaintiffs complain from federal antitrust laws; (3) federal securities laws have no application to claims found in plaintiffs' complaint; (4) plaintiffs have failed to cite the Court any federal "civil right" respecting the method of paying insurance premiums; and (5) plaintiffs' remaining claims are equally unpersuasive.

(Not to be published - see local Rule 8(f)

UNITED STATES COURT OF APPEALS

for the District of Columbia Circuit

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No. 83-1797 September Term, 1984
Civil Action No. 80-02890

Owen Wilson, et al.,
on behalf of themselves
and all others similarly
situated,
Appellants

v.

North Carolina Mutual Life
Insurance Co. of Durham, a
North Carolina Corp., et al

Filed Oct 29, 1984

Geo. A. Fisher
Clerk

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Before: Edwards and Starr, Circuit Judges, and McGowan, Senior Circuit Judge

J U D G M E N T

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel. While the issues presented occasion no need for an opinion, they have been accorded full consideration by the Court. See Local Rule 13(c). On consideration of the foregoing, it is

ORDERED and ADJUDGED, by this Court,

that the judgment of the District Court appealed from in this cause is hereby affirmed. It is

FURTHER ORDERED, sua sponte, that the Clerk shall withhold issuance of the mandate herein until seven days after dispostion of any timely petition for rehearing. See Local Rule 14, as amended on November 30, 1981 and June 15, 1982. This instruction to the Clerk is without prejudice to the right of any party at any time to move for expeditied issuance of the mandate for good cause shown.

Per Curiam
For the Court
(s)
George A. Fisher
Clerk

## APPENDIX

STATUTES: Amendments to Sherman Act

15 U.S.C. Section 18

ACQUISITION BY ONE CORPORATION OF STOCK OR ASSETS OF ANOTHER

No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire

the whole or any part of the assets of one or more corporations engaged in commerce, where in any line of commerce in any section of the country, the effect of such acquisition, of such stocks or assets, or of the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition, or to tend to create a monopoly.

This section shall not apply to corporations purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition. Nor shall anything contained in this section prevent a corporation engaged in commerce from causing the formation of subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof, or from (15 U.S.C. 79j), the United States Maritime Commission, or the Secretary of

Agriculture under any statutory provision vesting such power in such Commission, Secretary, or Board.

15 U.S.C. Section 19

INTERLOCKING DIRECTORATES AND OFFICERS

No person at the same time shall be a director in any two or more corporations, any one of which has capital, surplus, and undivided profits aggregating more than $1,000,000. engaged in whole or in part in commerce, other than banks, banking associations, trust companies, and common carriers subject to the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, if such corporations are or shall have been theretofore, by virtue of their business and location of operation, competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the provisions of any of the antitrust laws. The eligibility of a director

under the foregoing provision shall be determined by the aggregate amount of the capital, surplus, and undivided profits, exclusive of dividends declared but not paid to stockholders, at the end of the fiscal year of said corporation next preceding the election of directors, and when a director has been elected in accordance with the provisions of this Act it shall be lawful for him to continue as such for one year thereafter.

When any person elected or chosen as a director or officer or selected as an employee of any bank or other corporation subject to the provisions of this Act is eligible at the time of his election or selection to act for such bank or other corporation in such capacity his eligibility to act in such capacity shall not be affected and he shall not become or be deemed amenable to any of the provisions hereof by reason of any change in owning and holding all or a part of the stock of

such susidiary corporations, when the effect of such formation is not to substantially lessen competition.

Nor shall anything herein contained be construed to prohibit any common carrier subject to the laws to regulate commerce from aiding in the construction of branches or short lines so located as to become feeders to the main line of the company so aiding in such construction or from acquiring or owning all or any part of the stock of such branch lines, nor to prevent any such common carrier from acquiring and owning all or any part of the stock of a branch or short line construction by the independent company where there is no substantial competition between the company owning the branch line so constructed and the company owning the main line acquiring the property or an interest therein nor to prevent such common carrier from extending any of its line through the medium of the acquisition of stock or

otherwise of any other common carrier where there is no substantial competition between the company extending its lines and the company whose stock, property, or an interest therein so acquired.

Nothing contained in this section shall be held to affect or impair any right theretofore legally acquired: Provided, That nothing in this section shall be held or construed to authorize or make lawful anything heretofore prohibited or made illegal by the antitrust lasw or to exempt any person from the penal provisions thereof or the civil remedies therein provided.

Nothing contained in this section shall apply to transactions duly consummated pursuant to authority given by the Civil Aeronautics Board, Federal Communications Commission, Federal Power Commission, Interstate Commerce Commission, the Securities and Exchange Commission in the

exercise of its jurisdiction under section 10 of the Public Utility Holding Co-pany Act of 1935 the affairs of such bank or other corporation from whatsoever cause, whether specifically excepted by any of the provisions hereof or not, until the expiration of one year from the date of his election or employment.

15 U.S.C. Sections 1011-1012-1013

McCarran-Ferguson Act

Section 1011: Declaration of Policy

The Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

Section 1012: Regulation by State law, applicability of certain Federal laws after June 30, 1948

(a) The busines of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business,

(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: Provided, that after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

Section 1012: Suspension until June 30, 1948, of application of certain Federal laws: Sherman Antitrust Act applicable to agreements to, or acts of, boycott, coercion, or intimidation

(a) Until June 30, 1948, the Act of July 2, 1890, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, and the Act of June 19, 1936, known as the Robinson-Patman Anti-Discrimination Act, shall not apply to the business of insurance or to acts in the conduct thereof.

(b) Nothing contained in this chapter shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation.

SUPREME COURT OF THE UNITED STATES

No. A-676

OWEN WILSON, ET AL

Applicants

v.

NORTH CAROLINA MUTUAL LIFE INSURANCE CO. OF DURHAM, ET AL.

---

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

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UPON CONSIDERATION of the application of the applicants,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including April 16, 1985

(s) Warren E. Burger

Chief Justice of the United States

Dated this 11th day of March, 1985

Office - Supreme Court, U.S.
FILED
MAY 22 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-1716

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1984

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OWEN WILSON, *et al.*,
*Petitioners,*

v.

NORTH CAROLINA MUTUAL LIFE INSURANCE COMPANY, *et al.*,
*Respondents.*

---

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit**

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## BRIEF FOR RESPONDENTS IN OPPOSITION

---

EUGENE D. GULLAND *
COVINGTON & BURLING
1201 Pennsylvania Ave., N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-6000

HARRISON M. ROBERTSON, JR.
MICHAEL E. YAGGY
NILES, BARTON & WILMER
929 North Howard Street
Baltimore, Maryland 21201
(301) 539-3240

*Counsel for Respondents*

* Counsel of Record

May 1985

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

## QUESTIONS PRESENTED

1. Whether petitioners may relitigate in federal courts the same factual issues finally resolved against them in extensive evidentiary hearings by the Maryland Insurance Commissioner and on appeals dismissed by the Maryland state courts.

2. Whether petitioners have standing, as alleged owners or former officers of an insurance company, to prosecute a federal antitrust action alleging that the public has been injured by a contract of reinsurance, approved by the Maryland Insurance Commissioner, between their company and another.

3. If petitioners may relitigate the factual issues, and have standing, whether a contract of reinsurance approved by the Maryland Insurance Commissioner under state laws extensively regulating such insurance transactions is exempted from the federal antitrust laws by the McCarran-Ferguson Act, 15 U.S.C. § 1012(b).

## STATEMENT PURSUANT TO RULE 28.1

Set forth below, pursuant to Rule 28.1, is a list of all parent companies, subsidiaries and affiliates of respondent North Carolina Mutual Life Insurance Company:

Mid-West Underwriters, Inc.
American Citizens Life Insurance Company, Inc.
American Capital Life Insurance Company
NCM Life Communications
Nashville Television, Inc.
Charlotte Broadcasting Company
Holly Hill Cablevision, Inc.
St. George Cablevision, Inc.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1984

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No. 84-1716

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OWEN WILSON, *et al.*,
*Petitioners,*

v.

NORTH CAROLINA MUTUAL LIFE INSURANCE COMPANY, *et al.*,
*Respondents.*

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**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit**

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## BRIEF FOR RESPONDENTS IN OPPOSITION

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### RELATED PROCEEDINGS AND JUDGMENTS BELOW

The petition does not accurately reflect the eight-year procedural history of this litigation, which is marked by petitioner Owen Wilson's persistent opposition to a reinsurance contract between North Carolina Mutual Life Insurance Company ("North Carolina") and Mutual Benefit Society of Baltimore ("Mutual").

#### The Maryland Litigation

Wilson, a former officer, director and policyholder of Mutual, first opposed the contract in protracted hearings before the Maryland Insurance Commissioner ("MIC"). The MIC approved the reinsurance transaction seven years ago in a comprehensive 48-page written decision. *In Re: Approval of a Contract and Agreement of Reinsurance of the Mutual Benefit Society of Baltimore City*

(Case No. 1960, decided June 5, 1978) (cited hereinafter as "MIC Order").[1] The Baltimore City Court dismissed Owen Wilson's appeal, the Maryland Special Court of Appeals affirmed the dismissal, and the highest court in Maryland denied certiorari. *Wilson* v. *Insurance Commissioner of the State of Maryland*, No. 24-P, File No. 101580, Balt. City Ct. (November 9, 1978), *aff'd*, No. 1237, Court of Sp. App. (June 14, 1979), *cert. denied*, No. 217, Maryland Court of Appeals (September 10, 1979).[2]

**The Federal Litigation**

Petitioner Wilson and others commenced these proceedings in November 1980, seeking to set aside the reinsurance transaction based on federal securities, civil rights, antitrust and state law theories. On June 30, 1983, the United States District Court for the District of Columbia dismissed the action and entered judgment for respondents. (Petition, Appendix A, pp. 23-24.) The United States Court of Appeals for the District of Columbia Circuit affirmed without opinion in a judgment filed on October 29, 1984. (Petition, Appendix B, pp. 25-26.)

## STATUTES INVOLVED

Pertinent provisions of the Maryland Insurance Code as they existed in 1978 are included in the appendix to this brief. *See* pp. 1a-6a, *infra*.

## COUNTERSTATEMENT OF THE CASE

Mutual is a small, Baltimore-based mutual insurance company operating only in the state of Maryland. (MIC Order at 3.) In 1977, Mutual was in financial difficulty,

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[1] The MIC Order was submitted to the district court and also was included as a separate appendix to respondents' brief to the court of appeals.

[2] The District of Columbia Superintendent of Insurance also examined and approved the reinsurance transaction to the extent it affected a subsidiary of Mutual located in the District of Columbia. *In Re: American Citizens Life Insurance Corporation* (Order 77-26, decided May 13, 1977).

having sustained operating losses and suffered a shrinking surplus for eight of the nine preceding years. (*Id.* at 12.) With petitioner Owen Wilson and his daughter the only dissenting directors, Mutual's Board voted 7-2 to enter into a contract of reinsurance under which North Carolina would assume Mutual's insurance policy liabilities and assets. (*Id.* at 1, 16.)[3] North Carolina, a large and stable insurance company with an "excellent reputation," possessed the financial strength to shoulder Mutual's mounting liabilities and protect its policyholders. (*Id.* at 7-9, 42.)

Maryland, like virtually all states, pervasively regulates the insurance business through an administrative agency—the MIC—specializing in that industry. Under the Maryland Insurance Code, 48-A Md. Code § 274, the proposed reinsurance transaction could only be consummated in accordance with statutory procedures requiring (i) approval of Mutual's policyholders; and (ii) the MIC's authorization, following evidentiary hearings establishing that the transaction complied with applicable law, provided adequate protection to Mutual's policyholders, and was fair to Mutual.

**Proceedings Before the MIC**

In accordance with procedures supervised by the MIC, an independent mailing firm sent proxy materials to the 22,000 policyholders of Mutual. (MIC Order at 16.) The materials included petitioner Owen Wilson's written statement of reasons why he objected to the transaction and his recommendation that policyholders vote against it. (*Id.* at 17.) More than 80 percent of the responding policyholders voted in favor of the reinsurance transaction. (*Id.*)

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[3] Petitioners persist in terming the transaction a "merger." They made the same argument to the MIC, which rejected it. (MIC Order at 20.) The fact is, as the complaint recognizes (Complaint, ¶ 7), that Mutual continues in existence. *See* p. 15, *infra*.

The MIC then heard testimony on the reinsurance transaction during many days of hearings in October, November and December 1977. By law, the proceedings are "quasi-judicial" in nature and petitioners had the right to subpoena witnesses, to present evidence and to cross-examine opposing witnesses. 48-A Md. Code §§ 38-39. Further hearings were held in May 1978 to enable Owen Wilson and others to present additional opposition evidence. The hearings were convened only after "due notice [was] given" by both newspaper notice and mail to interested parties. (MIC Order at 4.) The "hearings were well attended and the chief participants were represented by able and experienced counsel." (*Id.*)[4] The MIC delayed its decision for nearly five months in order to schedule additional evidentiary hearings requested by Owen Wilson's counsel. (*Id.* at 41.)

**The MIC's Decision**

Owen Wilson and other petitioners raised the same objections before the MIC that they later sought to relitigate below. The MIC rejected each of the contentions in a 48-page decision which the district court rightly characterized as "detailed."

Thus, in accordance with the reinsurance provisions of 48-A Md. Code § 274, the MIC concluded, *inter alia*, that (1) the rights of Mutual policyholders "are amply protected under the [reinsurance] agreement" (MIC Order at 42); (2) the transaction is "fair and equitable to Mutual" (*id.* at 43); and (3) the transaction had been duly approved by many more than the required two-thirds of voting policyholders. (*Id.* at 42-43.)[5] The MIC

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[4] The MIC noted that petitioner Owen Wilson was personally responsible for "most of the opposition to the proposal. . . ." (MIC Order at 18.) Owen Wilson filed nine petitions opposing the transaction (*id.* at 44-45) but "he declined to accept an invitation of the Insurance Commissioner to testify" at the hearings. (*Id.* at 18.)

[5] The MIC also explored in detail—and rejected—contentions that the proxy materials sent to policyholders had been misleading or

also considered and rejected Owen Wilson's contentions that the reinsurance transaction would violate the antitrust/fair trade practice provisions of the Maryland Insurance Code, 48-A Md. Code §§ 220, 229; after analyzing the evidence, the MIC concluded that North Carolina would have only a trivial share of the business within the pertinent markets and that the transaction would certainly not "create a monopoly or lessen competition in any measurable degree." (MIC Order at 29-31.)

Only petitioner Owen Wilson sought to appeal the MIC's decision under the exclusive statutory judicial review procedure. 48-A Md. Code § 40. His appeal was dismissed for failure to comply with the rules and procedures for appeals; the dismissal was upheld by the Maryland Court of Special Appeals and certiorari was denied by the Maryland Court of Appeals. (*See* pp. 1-2, *supra.*)

**The Commencement of the Federal Litigation**

In late 1980—more than two years after the MIC's decision—petitioners commenced this litigation. The complaint chiefly challenged the reinsurance transaction as a "conspiracy" among defendants to obtain assets of Mutual for unfairly low consideration. It also alleged that the transaction violated federal securities, civil rights and antitrust statutes. The complaint sought equitable relief nullifying the reinsurance transaction and prayed for damages. (Complaint, ¶¶ 60-69.)

The petition for certiorari abandons all but the antitrust theories. The complaint alleged that the reinsurance transaction violated Section 7 of the Clayton Act, 15 U.S.C. § 18, by reducing competition among insurance companies. (Complaint, ¶¶ 15-33.) The complaint does not allege that plaintiffs (*i.e.*, petitioners) suffered any

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otherwise inadequate. (MIC Order, 18-23.) Similarly, the MIC found no basis for assertions that there were any "improper corporate acts" undertaken in connection with the authorization and approval of the reinsurance transaction. (*Id.* at 32.)

antitrust injury; rather, it asserts that "the insurance purchasing public in this line of commerce has been denied the benefits of free and open competition." (Complaint, ¶ 32.) Plaintiffs sought relief for themselves on the different theory that they are "policyholders who are the owners of Mutual" and that the reinsurance transaction diminished, or deprived them of, the value of their alleged ownership interests. (Complaint, ¶¶ 1, 29-32, 59-60.)

## REASONS FOR DENYING THE WRIT

Far from meeting the requirement of Rule 17.1 that there be "special and important reasons" for review by certiorari of the decision below, this case was properly disposed of by settled and noncontroversial principles. The petition does not and could not cite any conflict between the decision below and decisions of this Court, federal courts of appeal or any state courts.

*First,* petitioners' "antitrust" claims were nothing more than an effort to dress as a "federal" cause of action the identical competitive evidence and arguments they had unsuccessfully presented to the MIC. The MIC expressly found that the transaction would have no appreciable effect on competition within Maryland—Mutual's *only* market. Maryland law does not permit collateral attacks on the MIC's findings and conclusions. Under 28 U.S.C. § 1738 and decisions of this Court, petitioners cannot relitigate these factual issues simply by recasting them as federal claims.

*Second,* another fatal flaw in petitioners' "antitrust" claims is their lack of standing to assert them. They brought suit to vindicate injury to their alleged ownership interests in Mutual. The only "antitrust injury" alleged in the complaint is harm the general public might suffer from asserted reductions in competition. There is no allegation that any petitioner has suffered "antitrust injury" and it is clear that, under settled principles, pe-

titioners have no standing to litigate some generalized public interest in unspecified "competition."

*Third*, petitioners' bewildering discussion of the impact of the McCarran-Ferguson Act upon health care and health insurance is irrelevant to this case, and seems designed to distract attention from the dispositive standing and relitigation obstacles to their antitrust claims. The only McCarran-Ferguson Act issue raised below was the district court's alternative finding that detailed state regulation of the reinsurance contract in the interests of policyholders qualified for McCarran-Ferguson exemption. The only other court that has considered this question decided it in the same way.

## I. PETITIONERS' EFFORTS TO RELITIGATE THE ISSUES

The district court held, *inter alia*, that petitioners' complaint "represents a meritless collateral attack upon the findings and conclusions issued by the [MIC]." (Petition, p. 24.) This is indeed a paradigm case for application of "*res judicata* and collateral estoppel [to] relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication." *Allen* v. *McCurry*, 449 U.S. 90, 94 (1980).

Petitioners seek to relitigate the final approval of a long-consummated transaction affecting the rights of thousands of former Mutual policyholders. Maryland has found that the "complex problems" of insurance can be resolved "more expeditiously, effectively, cheaply and simply" by confiding them to an agency having "expertise and superior ability." *State Ins. Comm'r* v. *Nat'l Bureau of Casualty Underwriters*, 248 Md. 292, 236 A.2d 282, 286 (1967). To this end, Maryland's Insurance Code requires persons aggrieved by any decision of the MIC to present their opposition in an exclusive statutory appeal

process. 48-A Md. Code § 40. Petitioners could have challenged all aspects of the MIC's decision and even introduced additional evidence. *Id.*, § 40(4). Only Owen Wilson appealed. But his failure to do so in timely fashion resulted in dismissal, which was upheld by the Maryland appellate courts.

Maryland law requires parties aggrieved by administrative decisions to make use of the exclusive statutory appeal procedure and forbids collateral attacks through other forms of action. *Lawrence N. Brandt, Inc.* v. *Montgomery County Comm'n on Landlord-Tenant Affairs*, 39 Md. App. 147, 383 A.2d 688, 693-95, (1978); *Fertitta* v. *Brown*, 252 Md. 594, 251 A.2d 212 (1969); *see also, Ohio Casualty Ins. Co.* v. *Insurance Commissioner*, 39 Md. App. 547, 387 A.2d 622 (1978). Moreover, Maryland embraces the standard rule of collateral estoppel under which "determinations of fact or issues actually litigated in the first case are conclusive in [the second]." *MPC, Inc.* v. *Kenny*, 279 Md. 29, 32, 367 A.2d 486, 489 (1977). Here, as in *Badders* v. *Uhler*, 233 Md. 441, 197 A.2d 120, *cert. denied*, 377 U.S. 958 (1964), the dismissal of petitioner Owen Wilson's appeal confirmed that the MIC's decision could no longer be challenged under Maryland law. Federal courts are obliged by 28 U.S.C. § 1738 to accord the final decision the same "full faith and credit" as would Maryland courts. *Marrese* v. *American Academy of Orthopaedic Surgeons*, —— U.S. ——, 105 S.Ct. 1327 (decided March 4, 1985); *Allen* v. *McCurry*, *supra*, 449 U.S. at 96; *see also, Kremer* v. *Chemical Construction Corp.*, 456 U.S. 461, 466 (1982).

It is true that the MIC did not (and could not) assert jurisdiction over federal antitrust claims. But petitioner Owen Wilson himself injected competitive issues arising under state law into the MIC proceedings, and the MIC gave them detailed consideration. Its decision on these issues was governed by the identical statutory appeal procedures under 48-A Md. Code § 40.

The MIC's decision is clear and comprehensive on these points. Owen Wilson and others contended that the reinsurance transaction would " 'reduce competition in the industrial insurance business' " and urged that it be disapproved under antitrust/unfair trade practices provisions of the Maryland Code that are in terms substantially identical to the standards of the Clayton Act. (MIC Order, 28-29.)[6] The MIC conducted a detailed review of the markets in question, which were all within Maryland —the only state within which Mutual does business. (*Id.* at 3, 29-31.) Even under the definition of the market resulting in the highest post-transaction market share, the MIC found that Mutual's share of the market[7] was less than one percent, and that Mutual and North Carolina would together have less than two-and-one-half percent of the market if the reinsurance transaction were implemented. (*Id.* at 29.) The MIC also stressed that many other insurers in the market dwarfed Mutual and North Carolina. (*Id.* at 29-31.) Considering these and other pertinent facts, the MIC expressly found that the reinsurance transaction raised no conceivable competitive issue:

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[6] 48-A Md. Code § 229 prohibits acquisitions, common management or other transactions that would "substantially lessen competition generally in the insurance business or tend to create a monopoly therein." Section 220 likewise forbids acts or "agreements" that "result in or tending to result in unreasonable restraint of, or monopoly in, the business of insurance." The MIC has jurisdiction to enforce these provisions under Art. 48-A Md. Code §§ 215-16.

[7] The geographic market analyzed by the MIC was properly focused on Maryland, the only state in which Mutual is authorized to do business. (MIC Order, 3; Complaint ¶ 7.) Nor did the MIC make "extraterritorial" findings on competition. To the extent the stock of a small District of Columbia insurer was involved—American Citizens—the D.C. Superintendent of Insurance specifically found in a separate proceeding that the competitive standards of 35 D.C. Code § 1903(d)(1)(B) (1978) were satisfied. (*See* p. 2, n.2, *supra.*) That provision required a finding that the transaction would not "substantially lessen competition in insurance in the District or tend to create a monopoly therein."

> "Acquisition of Mutual Benefit by North Carolina would certainly not create a monopoly or tend to lessen competition in any measurable degree. The reason is simply that Mutual Benefit is such a very small factor in the total insurance market. This is true even in the specialized market in which Mutual Benefit operates." (*Id.* at 29.)

These findings, applying state-law competitive standards virtually identical to the Clayton Act standards raised anew by petitioners, necessarily foreclose relitigation of the issues. The federal courts' exclusive jurisdiction over Clayton Act cases does not permit petitioners to avoid the standard principles of collateral estoppel (or "issue preclusion") and Maryland law that forbid relitigation of the same factual issues in the guise of new, "federal" claims. *See, e.g., Azalea Drive-In Theatre* v. *Hanft*, 540 F.2d 713, 715 (4th Cir. 1976), *cert. denied*, 430 U.S. 941 (1977); *Straus* v. *American Publishers' Ass'n*, 201 Fed. 306, 310 (2d Cir. 1912), *app. dismissed*, 235 U.S. 716 (1913); *see also, Marrese, supra*, 105 S.Ct. at 1332; *Becher* v. *Contoure Laboratories, Inc.*, 279 U.S. 388 (1929); *Kremer* v. *Chemical Construction Corp., supra*, 456 U.S. at 482 n.22. Since Maryland law forbids petitioners from attacking the MIC's findings in proceedings other than the statutory appeal procedures, they may not relitigate the same factual issues in a federal court.

## II. PETITIONERS' LACK OF ANTITRUST STANDING

Private plaintiffs have standing to raise antitrust claims only when they suffer injury caused by anticompetitive effects of an activity prohibited by the antitrust laws. *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977).[8] Petitioners have not complained

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[8] In *Brunswick*, this Court held:

> ". . . for plaintiffs to recover treble damages on account of § 7 violations, they must prove more than injury causally linked to an illegal presence in the market. Plaintiffs must prove *anti-*

of injury sustained by monopolization or other anticompetitive conduct. Rather, they asserted that the reinsurance transaction unfairly deprived them of their full rights as alleged *owners* of Mutual. (Appellants' Court of Appeals Br. 10, 19-20; Complaint, ¶¶ 1, 29-32, 59-60).[9] Thus, petitioners sued as "policyholders who are owners of the Mutual Benefit Society of Baltimore." (Complaint, ¶ 1.) They sought treble damages based on the alleged diminution of their ownership interest in Mutual (Complaint, ¶ 60), and they equated their membership status in Mutual (a mutual corporation) with stockholder status in a stock corporation. (Appellants' Court of Appeals Br. 10.) *See Petition of Charlton Bros. Transp. Co.*, 30 A.2d 538 (Md. 1942).

Consistent with the rule of *Brunswick*, however, persons complaining of the impact of acquisitions upon their ownership interests generally have no standing to litigate competitive claims under Section 7 of the Clayton Act. *Central National Bank* v. *Rainbolt*, 720 F.2d 1183, 1186-87 (10th Cir. 1983). *A fortiori*, stockholders do not have standing to bring a treble damage action or a suit for injunctive relief with respect to allegedly anticompetitive transactions affecting their corporation because "[i]t is well settled that a stockholder is not a person injured in his business or property within the meaning of the antitrust laws." *Kreager* v. *General Electric Co.*, 497 F.2d 468, 472 (2d Cir. 1974), *cert. denied*, 419 U.S. 861 (1974). A legion of federal cases upholds these principles.[10]

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*trust injury*, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." 429 U.S. at 489.

[9] The complaint alleges that the *general public* has suffered from the loss of competition, but does not allege that any plaintiff has been injured by that loss of competition. (Complaint, ¶¶ 32, 52-58.)

[10] Cases ruling that shareholders may not bring an antitrust suit when the value of their stock has been impaired include: In Re

Petitioner Owen Wilson also sought a separate award of damages in his capacity as "officer, director, policyholder [and] stockholder." (Complaint, ¶ 60.) He, too, alleged no "antitrust injury" within the meaning of *Brunswick*. The cases uniformly hold that directors and employees have no standing to raise antitrust claims because their injury is not "within that area of the economy which is endangered by a break down of competitive conditions in a particular industry." *Conference of Studio Unions* v. *Lowes, Inc.*, 193 F.2d 51, 55 (9th Cir. 1951), *cert. denied*, 342 U.S. 919 (1952); *Central National Bank* v. *Rainbolt, supra*, 720 F.2d at 1186.[11]

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Industrial Gas Antitrust Litigation, 681 F.2d 514, 517-18 (7th Cir. 1982), *cert. denied*, 460 U.S. 1016 (1983); Mayer Goldberg Inc. of Lorain v. Fisher Foods, Inc., 717 F.2d 290 (6th Cir. 1983); Jeffrey v. Southwestern Bell, 518 F.2d 1129, 1131 (5th Cir. 1975); Reibert v. Atlantic Richfield Co., 471 F.2d 727, 731 (10th Cir.), *cert. denied*, 411 U.S. 938 (1973); Peter v. Western Newspaper Union, 200 F.2d 867, 872 (5th Cir. 1953); Peterson v. Borden Co., 50 F.2d 644, 645-46 (7th Cir. 1931); Ash v. International Business Machines, 353 F.2d 491. 493-94 (3d Cir. 1965), *cert. denied*, 384 U.S. 927 (1966); New Sanitary Towel Supply, Inc. v. Consolidated Laundries Corp., 211 F. Supp. 276 (S.D.N.Y. 1962).

Nor does a shareholder have standing under the antitrust laws when he has lost dividends or salaries. Westmoreland Asbestos Co., Inc. v. Johns-Manville Corp., 30 F. Supp. 389, 391 (S.D.N.Y. 1939), *aff'd on opinion below*, 113 F.2d 114 (2d Cir. 1940); Gerli v. Silk Assn. of America, 36 F.2d 959 (S.D.N.Y. 1929). Nor could a shareholder secure standing by alleging that he has been deprived of voting rights. National Supply Co. v. Hillman, 57 F. Supp. 4, 8 (W.D. Pa. 1944). *See also* Associated General Contractors of California v. California State Council of Carpenters, 459 U.S. 519, 534 n.29 (1983), citing Ames v. American Telephone & Telegraph Co., 166 Fed. 820 (D. Mass. 1909) for the proposition that "a stockholder has no legally cognizable antitrust claim against defendants for illegally acquiring the corporation, thereby rendering plaintiffs' stock worthless. Plaintiffs' claim was not distinguishable from any injury sustained by the company itself."

[11] *See also*, Gerli v. Silk Ass'n of America, *supra*, 36 F.2d at 960-61; Jeffrey v. Southwestern Bell, *supra*, 518 F.2d at 1131; Reibert v. Atlantic Richfield Co., *supra*, 471 F.2d at 731; Fein v. Security Banknote Co., 1957 CCH Trade Cas. ¶ 68,887 (S.D.N.Y. 1957).

Petitioners cannot acquire personal standing by alleging that "members of the insurance purchasing public have been denied the benefits of free and open competition in the market place." (Complaint, ¶ 32.) The most basic principle of standing is that a plaintiff must allege personal, concrete injury to *himself*. It is not sufficient to assert "a 'generalized grievance' shared in substantially equal measure by all or a large class of citizens." *Warth* v. *Seldin*, 422 U.S. 490, 499 (1975). Here, there is no allegation that any petitioner was harmed by any reduced competition; to the contrary, the MIC specifically found that competition would not be affected and that the reinsurance transaction would preserve and protect appellants' interests as policyholders. (MIC Order, 29-31.) In fact, the Maryland Attorney General, whose responsibilities include protection of the "insurance purchasing public" in Maryland, urged below that petitioners' litigation should be dismissed. (Letter from Maryland Attorney General to District Court dated January 5, 1983.)

## III. PETITIONERS' MCCARRAN-FERGUSON ACT CONTENTIONS

Petitioners contend, with scarcely any reference to the facts of this case, that the decisions below raise important questions of the applicability of the McCarran-Ferguson Act to programs seeking to contain health care costs. (Petition at 10-21.) The complaint focused entirely upon the life insurance business of the companies in defining an alleged market. (Complaint, ¶ 32.) There is no allegation whatsoever concerning health care cost containment issues and no such issues were ever raised below.

The McCarran-Ferguson Act is implicated only because the district court concluded that the case should be dismissed for the additional reason that the reinsurance transaction qualified for exemption under the Act. The Act provides that the Sherman and Clayton Acts shall be "applicable to the business of insurance" only "to the ex-

tent that such business is not regulated by state law." 15 U.S.C. § 1012(b). Here, the reinsurance transaction approved by the MIC met the literal requirements for exemption because it (1) embraced the "business of insurance" and (2) was regulated and approved under 48-A Md. Code § 274.

This Court has stressed that the "business of insurance" exempted by the McCarran-Ferguson Act is characterized by transactions: "transferring or spreading a policyholder's risk;" affecting the "policy relationship between the insurer and the insured;" and limited to "entities within the insurance industry." *Union Labor Life Ins. Co.* v. *Pireno*, 458 U.S. 119, 129 (1982). The reinsurance contract at issue here reflects each of these aspects of the business of insurance. The underwriting risk was being transferred from Mutual to North Carolina, two "entities" within the insurance industry. In accordance with the express terms of 48-A Md. Code § 274, "the protection or service to [Mutual's] policyholders"—*i.e.*, preservation of their insurance policy rights—was a paramount issue to be reserved at the hearings. The very purpose of the transaction was to rescue policyholders from Mutual's continuing financial decline by substituting North Carolina for Mutual as insurer.

We are aware of only one other decision that considered whether regulated reinsurance transactions are exempt under the McCarran-Ferguson Act, and it concluded that such transactions fall squarely within the "business of insurance" for the purpose of invoking the exemption:

> ". . . [T]he ultimate purpose of the [reinsurance] agreement is to provide *reliable insurance* to policyholders. Consequently, the agreement between Amreco and Calvert constitutes the 'business of insurance' within the meaning of the McCarran-Ferguson Act." *American Mutual Reinsurance Co.* v. *Calvert Fire Insurance Co.*, 367 N.E.2d 104, 109 (Ill. App. 1977), *cert. denied*, 436 U.S. 906 (1978).

Petitioners cannot change the true character of the reinsurance transaction by arguing that its asset conveyance aspects make it a "merger." The MIC rejected the same argument when it was advanced by petitioner Owen Wilson, and Mutual in fact continues to exist as an independent entity. (MIC Order at 20; Complaint, ¶ 7.)

In recent years, there have been a number of decisions —particularly involving the health care industry—construing narrowly the McCarran-Ferguson Act exemption. *See, e.g., Group Life and Health Ins. Co.* v. *Royal Drug Co.*, 440 U.S. 205 (1979); *Union Labor Life Ins. Co.* v. *Pireno, supra*, 458 U.S. 119. To the extent that the petition really means to argue generally that the district court's alternative holding applied the exemption too broadly in view of these cases, no issue worthy of this Court's review is presented. The case was properly disposed of on the collateral estoppel and standing issues, so that McCarran-Ferguson Act questions are of purely academic interest. Even then, the exemption question depends on facts that are unique to this case, involves no important issues, and raises no conflict between the judgments below and decisions of other courts.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

EUGENE D. GULLAND *

COVINGTON & BURLING
1201 Pennsylvania Ave., N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-6000

HARRISON M. ROBERTSON, JR.
MICHAEL E. YAGGY

NILES, BARTON & WILMER
929 North Howard Street
Baltimore, Maryland 21201
(301) 539-3240

*Counsel for Respondents*

* Counsel of Record

May 1985

# APPENDIX

## APPENDIX

MARYLAND INSURANCE CODE, ART. 48-A OF THE ANNOTATED CODE OF MARYLAND (1978):

§ 37. Notice of Hearing.

"Not less than ten (10) days in advance the Commissioner shall give notice of the time and place of the hearing, stating the matters to be considered thereat. If the persons to be given notice are not specified in the provision pursuant to which the hearing is held, the Commissioner shall give such notice to all persons directly affected by such hearing. In the event all persons directly affected are unknown, notice may be perfected by publication in a newspaper of general circulation in this State at least ten (10) days prior to such hearing."

§ 38. Hearing Procedure.

"(1) *Hearings to be Open to Public.*—Except as to filing made under subtitle 16 hearings shall be open to the public in accordance with the provisions of Article 41, § 14.

(2) *Right to Appear and Present Evidence, etc.*—The Commissioner shall allow any party to the hearing to appear in person and by counsel, to be present during the giving of all evidence, to have a reasonable opportunity to inspect all documentary evidence and to examine witnesses, to present evidence in support of his interest, and to have subpoenas issued by the Commissioner to compel attendance of witnesses and production of evidence in his behalf.

(3) *Intervention.*—The Commissioner shall permit to become a party to the hearing by intervention, if timely, any person who was not an original party thereto and whose pecuniary interests are to be directly and immediately affected by the Commissioner's order made upon the hearing.

(4) *Rules of Pleading and Evidence.*—Formal rules of pleading or evidence need not be observed at any hearing.

(5) *Record of Proceedings.*—Upon written request seasonably made by a party to the hearing and at such person's expense, the Commissioner shall cause a full stenographic record of the proceedings to be made by a competent reporter. If transcribed a copy of such stenographic record shall be furnished to any other party to such hearing at the request and expense of such other party. If no stenographic record is made or transcribed, the Commissioner shall prepare an adequate record of the evidence and of the proceedings."

§ 39. Order on Hearing.

"(1) In conducting any such hearing the Commissioner shall sit in a quasi-judicial capacity. Within thirty (30) days after termination of the hearing or of any rehearing thereof or reargument thereon, he shall make his order on hearing, covering matters involved in such hearing and in any rehearing or reargument thereof, and shall give a copy of such order to the same persons given notice of the hearing.

(2) The order shall contain a concise statement of the facts as found by the Commissioner, and of his conclusions therefrom, and the matters required by § 29.

(3) The order may affirm, modify, or nullify action theretofore taken or may constitute the taking of new action within the scope of the notice of the hearing."

§ 40. Appeals from Commissioner.

"(1) *Decisions Appealable; How and by Whom Appeal Taken; Parties; Jurisdiction.*—An appeal from the Commissioner shall be taken only from an order or hearing or with respect to a matter which the Commissioner has refused a hearing. Any person who was a party to such

hearing, or whose pecuniary interests are directly and immediately affected by any such order or refusal and who is aggrieved thereby may, within 30 days after (i) the order has been mailed or delivered to the persons entitled to receive it, or (ii) the Commissioner's order denying rehearing or reargument has been so mailed or delivered, or (iii) the Commissioner's refusal to grant a hearing, appeal from such order or hearing or such refusal of a hearing. The appeal shall be taken to the Baltimore City Court, by filing written notice of appeal in such court and by filing a copy of such notice with the Commissioner. However, in appeals from the suspension or revocation of the certificate of authority of a domestic insurer or of the license of an agent, broker, solicitor, adjuster, or adviser, the person taking the appeal at his option, in lieu of the Baltimore City Court, may take the appeal to the circuit court of the county of Maryland in which the insurer has its principal place of business or the licensee resides. An appeal taken pursuant to this subsection shall be captioned in the name of the person filing the appeal, as the party appellant, versus the Insurance Commissioner of the State of Maryland, as the party appellee. In all such appeals, the Commissioner shall be a necessary party appellee. In addition to the person filing the appeal and the Commissioner, any other person whose pecuniary interests are or may be directly and immediately affected by the matter on appeal, or who may be aggrieved thereby, upon application to the court, may be deemed an additional party appellant or appellee, as the court directs.

(2) *When Appeal to Operate as Stay.*—Upon filing of the notice of appeal therein the court shall have full jurisdiction, and shall determine whether such filing shall operate as a stay of the order or action from which an appeal is taken.

(3) *Record on Appeal.*—Within twenty (20) days after filing of the copy of the notice of appeal in his office, the

Commissioner shall make and return to the court in which the appeal is pending a copy of his order appealed from and a full and complete transcript, duly certified by the Commissioner, of the record upon which the order was issued, together with all exhibits and documentary evidence introduced thereat. If the appeal is from an action of the Commissioner with respect to which a hearing was refused, the Commissioner shall within such twenty (20) day period make and return to the court a full and complete transcript, duly certified by him, of all documents on file in his office directly relating to the matter as to which such appeal is taken.

(4) *Hearing de Novo.*—Upon receipt of such transcripts and evidence the court shall hear the matter de novo as soon as reasonably possible thereafter. Upon the hearing of the appeal the court shall consider the evidence contained in the transcript, exhibits, and documents therein filed by the Commissioner, together with such addiional evidence as may be offered by any party to the appeal.

(5) *Judgment.*—The court may affirm the decision of the Commissioner or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

(i) In violation of constitutional provisions; or

(ii) In excess of the statutory authority or jurisdiction of the Commissioner; or

(iii) Made upon unlawful procedure; or

(iv) Affected by other error of law; or

(v) Unsupported by competent, materia, and substantial evidence in view of the entire record as submitted: or

(vi) Against the weight of competent, material and substantial evidence in view of the entire record, as sub-

mitted by the Commissioner and including de novo evidence taken in open court; or

(vii) Unsupported by the entire record, as submitted by the Commissioner and including de novo evidence taken in open court; or

(viii) Arbitrary or capricious.

(6) *Costs.*—Costs shall be awarded as in civil actions.

(7) *Appeal to Court of Special Appeals.*—Appeal by any party appellant or party appellee including the Commissioner may be taken to the Court of Special Appeals from the judgment of the Baltimore City Court or circuit court of the county, as in other civil cases. A stay of the effectiveness of any such judgment may be made only by order of court upon the giving of such security as the court deems proper."

§ 229. Interlocking Ownership or Management.

"(a) Any insurer may retain, invest in or acquire the whole or any part of the capital stock of any other insurer or insurers, or have a common management with any other insurer or insurers, unless such retention, investment, acquisition or common management is inconsistent with any other provision of this article, or unless by reason thereof the business of such insurers with the public is conducted in a manner which substantially lessens competition generally in the insurance business or tends to create a monopoly therein.

(b) Any person otherwise qualified may be director of two or more insurers which are competitors, unless the effect thereof is to lessen substantially competition between insurers generally or tends materially to create a monopoly."

§ 274. Bulk Reinsurance—Mutual Insurers.

"(a) *Authorized; Agreement to be Filed With and Approved by Commissioner.*—A domestic mutual insurer may

reinsure all or substantially all its business in force or all or substantially all of a major class thereof, with another insurer, stock or mutual, by an agreement of bulk reinsurance after compliance with this section. No such agreement shall become effective unless filed with the Commissioner and approved by him in writing after a hearing thereon.

(b) *Approval or Disapproval by Commissioner; Notice of Disapproval.*—The Commissioner shall approve such agreement within a reasonable time after filing if he finds it to be fair and equitable to each domestic insurer involved, and that such reinsurance if effectuated would not substantially reduce the protection or service to its policyholders. If the Commissioner does not so approve, he shall so notify each insurer involved in writing specifying his reasons therefor.

(c) *Submission of Plan and Agreement to Vote of Members.*—The plan and agreement for such reinsurance must be approved by vote of not less than two thirds of each domestic mutual insurer's members voting thereon at meetings of members called for the purpose, pursuant to such reasonable notice and procedure as the Commissioner may approve. If a life insurer, right to vote may be limited to members whose policies are other than term or group policies, and have been in effect for more than one year.

(d) *Reinsurance of Mutual Insurer in Stock Insurer.*—If for reinsurance of a mutual insurer in a stock insurer, the agreement must provide for payment in cash to each member of the insurer entitled thereto as upon conversion of such insurer pursuant to § 270, of his equity in the business reinsured as determined under a fair formula approved by the Commissioner, which equity shall be based upon such member's equity in the reserves, assets (whether or not 'admitted' assets), and surplus, if any, of the mutual insurer to be taken over by the stock insurer."

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CLERK

IN THE SUPREME COURT OF THE UNITED STATES

No. 84-1716

OCTOBER TERM, 1984

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OWEN WILSON, et al, on behalf of themselves and all others similarly situated,

Petitioners

v.

NORTH CAROLINA MUTUAL LIFE INSURANCE COMPANY OF DURHAM, et al

Respondents

---

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

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# REPLY BRIEF FOR PETITIONERS

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OWEN M. WILSON, Attorney - Pro se
Counsel for other petitioners similarly situated
2412 Laurel Bush Road
Abingdon, Maryland 21009-1528
(301) 879-1805 (301) 836-8676

1984

## ANSWERS TO QUESTIONS RAISED BY RESPONDENTS

1. The issues raised by the Maryland Insurance Commissioner were never litigated in Maryland State Courts. There was simply a dismissal for filing appeal out of time.

2. Petitioners have standing to sue. All assets of their parent company were taken which included controling stock in subsidiaries. The 100% horizontal merger effectively virtually eliminated a special kind of competition. Interlocking officers and directors were installed in subsidiaries. They received nothing for their interests. They were damaged in their business and property interests through this antitrust action. Their status changed to insureds.

3. The complete merger, preferred to be termed "reinsurance" by respondents, is not exempt from federal antitrust laws owing to the principle of "business of insurance" and "business of insurance companies" as interpreted by this Court.

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---

# REPLY BRIEF FOR PETITIONERS

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## RELATED ISSUES AND FACTS INCLUDED

In the original petition were primarily included only facts and principles of law in this case that were important nationally, far reaching in need of resolution and possibly only resolvable by this Court. Some added background to the case is included on issues raised by respondents.

## REPLY TO COUNTERSTATEMENT OF THE CASE

In deference to the rule for brevity, petitioners did not attempt to restate in their petition details of the State action taken in this case through the Maryland Insurance Commissioner. Most of this information is included in the court record. A full review would be undertaken on grant of certiorari.

For what ever reason the Maryland Insurance Commissioner chose to carefully ignor all negative factors of law and facts that might tend to negate the approval of the acquisition of the Maryland parent insurance company. A brief outline of mistakes of law and facts follows:

1. Exceeded delegated authority, Maryland Legislature.

2. Attempted to rule on federal questions involving interstate action.

3. Attempted to compare life, health and hospital insurance company giants with

business done by acquired company, its subsidiary and Southern Life Insurance Company of Baltimore City. Not one of the larger companies operating in the market area offers the kind of insurance that was eliminated on the merger action viz: premiums as low as 25¢ monthly for life, health or hospitalization coverage.

4. In order to partially comply with a statutory rule of law, insisted that the complete merger was really not a merger but simply reinsurance.

5. Stated that over 2/3's of certificate holders of acquired parent company voted for the merger/reinsurance, as required by State law, when in fact less than 1/12th voted on their own, while the Secretary of the company, with proper proxies, did vote for over 2/3's of the company's policyholders against the merger, but to no avail.

6. Stated acquired company was in financial difficulty when its highly profitable subsidiary in Washington, D.C. eliminated any

loss possibility. One simple 'phone call to switch securities by the then president, who promoted the entire deal to obtain a substantial payment from the acquiring group personally, could have made the subsidiary profits an unnecessary addition.

7. Failed to use uniform bond portfolio valuation methods for acquired and acquiring company. Use of current true cash realizable value would have shown acquiring company with impaired surplus and acquired company with substantial surplus funds.

8. Denied consideration of a legally approved reserve valuation method to acquired company that would have increased further its very adequate surplus.

9. Claimed acquisition by a foreign company was to the best interest of policyholders when in fact certificate holders of acquired company and minority stock holders of subsidiary company recived nothing for their interest in their companies. No share of surplus, premium renewals and special

reserves built up after over seventy years of operation, or any other benefits and credits owners of a going established business normally receive on take over or merger. The only thing received was a negative surplus in a new company when the bond portfolio was valued as in their company. They did not receive new contracts of insurance. Their company was eliminated totally.

10. Took over Southern Life which was a part of the total acquisition plan of the acquirers. Refused to make corrections to statutory reserves causing the company to show an impaired capital account.

There are many cases denying authority to administrative agents where their action is, capicious abuse of discretion, arbitrary or was otherwise not in accordance with the law. Peters v. Hobby, 75 S. Ct. 790. Stark v. Wichard, 64 S. Ct. 559.

The Maryland Insurance Commissioner's review authority of merger/reinsurance proposals is very limited by State law.

Since he so clearly exceeded his local authority and had no federal authority, it would indicate that his findings were invalid and void unconstitutionally as arbitrary and discriminatory even without consideration of all errors and omissions noted above. Brotherhood & Union of Transit Emp. v. Madden 147 F2, 439.

By the "clearly erroneous" rule the Court will set aside a determination of fact which it adjudged to be clearly wrong. District of Col. v. Pace 64 S. Ct. 406; Bates & Guild Co. v. Payne 24 S. Ct. 595. An administrative order of decision may be vacated or set aside where there is an error of law, where statutory authority is exceeded. Citizens Com. for Hud. Val. v. Tolpe 425 F2, 97, cert. denied.

STANDING

This Court held in Flast v. Cohen 88 S. Ct. 1942, that standing is an aspect of justiciability. The fundamental aspect of standing is that it focuses on the party seeking

to get his complaint before a federal court and not the issues he wishes to have adjudicated.

The certificate holders of acquired company and minority stockholders of its subsidiary received absolutely nothing for their ownership interest on the 100% merger. Theirs was a promise implied since they did not receive new contracts from the acquiring company showing that their claims would be paid when presented some time in the future. Their interests in millions of dollars in sound net assets were fully eliminated through antitrust action.

The argument has been advanced that the acquired company itself must sue for damages as a result of monopolistic action rather than the owners, certificate holders and beneficiaries, who were all one and the same. They are the insured public standing on their own after the complete take over. Within three months after signing the contract merging the parent company, foreign corporation control

officers surrendered the certificate of authority. There was nothing remaining of the acquired parent company that could sue anyone on its own account, as a going life company

Hostile control officers moved into official positions of the subsidiary and the wholly owned holding company that was included in the assets of the acquired parent company. All certificate holders were no longer owners. Their company had been eliminated, they had become insureds only. Even respondents argument denying employees and owners the right to sue is inapplicable on consideration of these facts.

All parties suffered serious losses as a direct result of the merger activities. Their market source for added personal insurance of the same type already owned and originally available had been eliminated.

Respondents specifically point out petitioner, Owen Wilson as seeking separate damages. He too was no longer an officer, director, simply a beneficiary who had been

severely damaged by the antitrust action of respondent.

The end result of merger action was:

| Company | Acquired |
|---|---|
| Parent acquired company Mutual Benefit Soc. (MBS) | 100% all assets |
| Wholly owned subsidiary MidWest Underwriters Inc. | 100% all stock |
| Subsidiary, Wash. D. C. American Citizens Life | 90%+ stock |
| Allied company Southern Life of Baltimore | 50% + stock |

All insurance companies were direct horizontal competitors in the same market area as acquiring company. Considered in direct violation of the Sherman Act as amended by the Clayton Act and Celler-Kefauver Act.

This Court has held interest confering standing to sue may reflect aesthetic conservational, recreational or spiritual values as well as economic values. Asso. of Data Processing Service O., Inc. v. Camp 90 S.Ct. 827 and Allen v. Wright 104 S. Ct 3515. Also, "Personal stake" requirement for standing must consist of distinct palpable injury

to plaintiff and fairly traceable causual connection between claimed injury and challenged conduct. Larson v. Valente 102 S. Ct. 1673

McCARRAN-FERGUSON ACT

Petitioners had no intention to omit any points considered important in this case, however, in review of facts, pleadings and other considerations the McCarran appears to be a most important aspect to them and to the general question as it now stands with regard to the serious continued massive esculation in health insurance costs and related fields. Certainly there is an analogy existing there as developed in the original petition.

Respondents insist that consideration of the McCarran presents "no issue worth of this Court's review - ." Petitioners disagree. Health costs have exploded within the nation. The McCarran Act has made the field virtually free from effective competition until recently by this Courts action in Group Life and Health Ins. Co. v. Royal Drug Co. 99 S. Ct. 1075. Petitioners basically

consider this case their authority for elimination of the McCarran Act exemption from the Sherman Antitrust Act as amended so far as their case is concerned. They also consider their action closely akin to the effect this concept has to the nationwide monopoly existing for many years, guaranteed by the McCarran as applied to the Blue Cross and Blue Shield giants in the industry.

Since any meaningful change in the status of health entitlement can result in billions of dollars to the national budget, modification in the effect of the McCarran can be profound to the national Government.

Though petitioners believe that their case is free of the exemption and that the lower court erred in denying relief.a review of the current effect of the exemption could be of national importance to thousands of individuals and companies. This is expecially true now that it seems to appear that there may by no repeal or modification of the exemption in the very near future.

Dispite five recent hearings by the House Judiciary Committee, chairman, Peter Rodino (D. N.J.), in an effort to infrom legislators on the nature of the insurance industry, insurance company lobbyist are fearful of centralized government control if McCarran is repealed. It was pointed out that the market share of the largest insurance company is smaller than in other industries. The repeal of the Act would assist in health and accident insurance cost borne by the Federal Government. Without legislation effectively taking control in the near future the system in place throughout the nation will undoubtedly continue the upward spiral of costs. The only answer seems to be at the judicial level at this time.

Control of the McCarran-Ferguson Act amendment is a multibillion dollar question that applied in the right way can save thousands of lives and medical injuries through experience recounted in original petition.

The Clayton Act Amendment provides, among other things that "Any person who shall be injured in his business or property by anything forbidden in the antitrust laws, may sue therefore - - and shall recover three-fold the damages by him sustained. Reibert v. Atlantic Richfield Co. 471 F2, 727.

Respectfully submitted,

Owen M. Wilson

Attorney - Pro se, Counsel
for other Petitioners
2412 Laurel Bush Road
Abingdon, Maryland 21009
(301) 879-1805

## CERTIFICATE OF SERVICE

This is to certify that a copy of the aforegoing Petitioner's Reply Brief has been mailed, postpaid, this 10th day of JUNE 1985, to the following attorneys:

Eugene D. Gulland, Esq.
1201 Pennsylvania Avenue, N.W.
P. O. Box 7566
Washington, D. C. 20044

Charles J. Josey, Esq.
Houston Marshall Law Ctr. Bldg.
12 E. Pleasant St.
Baltimore, MD 21202

Harrison M. Robertson, Esq.
and
Michael E. Yaggey, Esq.
929 N. Howard St.
Baltimore, MD 21201